



05 OCT 2007

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In re Application of :
KEIM et al. : DECISION
Application No.: 10/531,159 :
PCT No.: PCT/US03/32887 :
Int. Filing Date: 14 October 2003 :
Priority Date: 11 October 2002 :
Attorney's Docket No.: 112624.00029 :
For: MOLECULAR SIGNATURE AND ASSAY :
FOR FLUOROQUINOLINE RESISTANCE IN :
BACILLUS ANTHRACIS :

This decision is in response to applicants' renewed petition under 37 CFR 1.10(d) filed on 06 February 2007. The renewed petition states that "Applicants hereby petition the Office of the Director under 37 CFR 1.181 to invoke its supervisory authority." This statement has been construed as a request for final agency review.

BACKGROUND

On 14 October 2003, applicants filed international application PCT/US03/32887, which designated the U.S. and claimed a priority date of 11 October 2002. A copy of the international application was communicated to the USPTO from the International Bureau on 02 December 2004. The thirty-month period for paying the basic national fee in the United States expired at midnight on 11 April 2005 (29 January 2005 being a Saturday).

On 12 April 2005, applicants filed a submission for entry into the national stage in the United States which was accompanied by, *inter alia*, the U.S. Basic National Fee.

On 09 June 2005, applicants filed a petition under 37 CFR 1.10(d) requesting that the papers filed in the submission for entry into the national stage be accorded a date of 11 April 2005 rather than 12 April 2005.

On 27 September 2005, a decision was mailed dismissing applicants' petition under 37 CFR 1.10(d) because applicant had failed to provide a showing, corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the

correspondence in the "Express Mail Post Office to Addressee" service of the USPS provide evidence from the USPS, which established to the satisfaction of the Commissioner that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day.

On 19 October 2005, the United States Designated/Elected Office (DO/EO/US) mailed a NOTIFICATION OF ABANDONMENT (Form PCT/DO/EO/909) indicating that the application was abandoned as to the United States of America as per the decision mailed 27 September 2005.

On 03 March 2006, applicants filed a renewed petition under 37 CFR 1.10(d).

On 21 June 2006, a decision was mailed dismissing applicants' renewed petition under 37CFR 1.10(d) because applicant had failed to provide a showing, corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS provide evidence from the USPS, which established to the satisfaction of the Commissioner that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day.

On 21 August 2006, applicant submitted a renewed petition under 37 CFR 1.10(d). Applicants' request that the Office of the Director invoke its supervisory authority under 37 CFR 1.181 was construed as a request for supervisory review.

On 06 December 2006, a decision signed by the Supervisory Legal Examiner in the Office of PCT Legal Administration was mailed dismissing applicant's petition under 37 CFR 1.10(d) without prejudice. Specifically, it was noted that applicant still had failed to provide a showing, corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS provide evidence from the USPS, which established to the satisfaction of the Commissioner that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day.

On 06 February 2007, applicant submitted the instant renewed petition under 37 CFR 1.10(d).

DISCUSSION

A review of the application papers located in the application file reveals that they were stamped with a receipt date of 12 April 2005. The "Express Mail" label number EV667329735US is shown on the Transmittal Letter which itemizes the items being filed. The copy of the Customer Copy of the "Express Mail Post Office to Addressee" mailing label accompanying the petition contains the same "Express Mail" label number. The copy of the

Customer Copy of Express Mail mailing label #EV535680024US shows a "Date In" of "041205".

37 CFR 1.10(d) states:

(d) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

As noted in the decision mailed 27 September 2005, a satisfactory showing has been made under 37 CFR 1.10(d)(1) and (2).

The affidavit of Maritza O'Neill has been considered. As noted in the previous decision, the affidavit of Maritza O'Neill refers specifically to Express Mail mailing label number EV667329735US, however, the affidavit was made six weeks after the date in question. The renewed petition urges that the "affidavits were completed by each individual only after all facts were known", that "six weeks is not an unreasonable time for that entire process to transpire", and that considering "the importance of the matter and the time spent with the investigation, which Ms. O'Neill was actively involved, the notion that her memory would have faded in those six weeks is unreasonable." The renewed petition also urges that the affidavit "goes into great detail in paragraphs 5-7 as to exactly what happened during her custody of this particular package (receiving patent application, completing transmittal documents, signing Certificate of Mailing, sealing Express Mail package, delivering the package to William Bilyk)." Nevertheless, the affidavit was still made six weeks after the date in question. The activities listed as having been performed on this package and thus being proof of Martza O'Neill's specifically remembering the package are activities that would be performed on filing any new patent application with the USPTO. It is not clear how these activities would make this particular package stand out in her memory. The only item referred to that includes an identification of the Express Mail mailing label number and the date of 11 April 2007 is the Certificate of Mailing. Again, however, this only goes to show intent to mail it on that date, not that it was actually mailed on that date.

The affidavits of William Bilyk and John Mitchell have been considered. As noted in the

previous decision, the affidavit of William Bilyk merely states that on April 11, 2005 and April 12, 2005, all packages in his custody were picked up by John Mitchell between 6:00 and 6:30 p.m. Neither the affidavit of William Bilyk nor the affidavit of John Mitchell specifically refer to Express Mail mailing label number EV667329735US. Rather, these affidavits simply confirm that each of these persons performed their usual duties on April 11, 2005 and April 12, 2005.

The affidavit of Robert D. Atkins has been considered. Mr. Atkins states that he reviewed and signed the transmittal documents and personally transferred custody of the documents to Maritza O'Neill on 11 April 2005. However, this does not establish that the documents were mailed by Express Mail on that date. Moreover, it is not clear what Mr. Atkins' recollection is based on. It is not clear how Mr. Atkins specifically remembers reviewing and signing the papers for this particular application. The affidavit was made six weeks after the date in question. The transmittal letter signed by Mr. Atkins does not even include the date of signing.

The courier log (Exhibit E) has been considered. It appears to be intended to satisfy what MPEP § 513 indicates is an adequate showing of the date of deposit under 37 CFR 1.10(d)(3). The relevant portion of MPEP § 513 states:

... a notation in a log book, entered after deposit by the person who deposited the correspondence as "Express Mail" within one business day of such deposit, setting forth *the items indicated above*, would be deemed on petition to be an adequate showing of the date of deposit under 37 CFR 1.10(d)(3). (emphasis added)

The "items indicated above" are

... a log book which contains information such as the "Express Mail" number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of entry in the log.

The document provided by applicant includes the date and time of deposit. However, it does not appear to include any of the other information. In particular, it does not include the "Express Mail" mail number or any file identification number. Without the "Express Mail" mail number and file identification number, it is not clear how one is to reliably identify the package at issue.

Applicants urge that the courier log is an independent and contemporaneous record, made within one business day of the deposit in question, that the Express Mail was in fact taken to the U.S. Post Office at the indicated time. However, the log does not contain any Express Mail numbers. One simply cannot determine from the log that the correspondence having Express Mail mailing label number EV667329735US was even entered in the log. Moreover, the declaration of John Mitchell dated 23 May 2005 states that the package was deposited directly with an employees of the U.S. Post Office located at 4949 E. Van Buren, Pheonix, Arizona 85026. However, the Express Mail mailing label shows the origin Zip code as 85034 rather than

85026. Either Mr. Mitchell is mistaken or Mr. Mitchell deposited the correspondence without receiving a copy of the Express Mail mailing label. 37 CFR 1.10(b) cautions against such action. ("Correspondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the Express Mail mailing label with the date-in clearly marked.")

Applicants also urge that the fact that the USPS records show Express Mail mailing label number EV667329735US in its possession as of 5:05 p.m. on 12 April 2005 in combination with the log establishes that Express Mail mailing label number EV667329735US was deposited with the USPS on 11 April 2005. The reasoning is that the log shows only one pick-up from Quarles & Brady on each of 11 April 2005 and 12 April 2005. The log shows both pick-ups as having been made after 6:00 p.m. Thus, the argument goes, the only way Express Mail mailing label number EV667329735US could have been in the USPS's possession as of 5:05 p.m. on 12 April 2005 was that it was picked up from Quarles & Brady and deposited with the USPS on 11 April 2005. However, this argument makes several presumptions that have not been established. First, that the log is somehow a reliable account of the pick-up and drop-off time of Express Mail mailing label number EV667329735US. As noted above, it is not. Again, there is nothing in the log that suggests that the reference number in the log (3041210) corresponds to Express Mail mailing label number EV667329735US. The second presumption is that all Express Mail packages from Quarles & Brady deposited with the USPS must be in the log of Mr. Mitchell. Again, this has not been established.

The letter from Melanie Thomas of the USPS has been considered. The letter fails to satisfy 37 CFR 1.10(b)(3). The renewed petition urges that "the USPTO cannot arbitrarily disregard an official statement from the USPS, its own agent". However, the official statement has not been arbitrarily disregarded. The renewed petition filed 21 August 2006 suggests that the letter from Melanie Thomas was based on the same evidence presented in the petition under 37 CFR 1.10(d) (page 5, first full paragraph. "The U.S. Post Office understood this reasoning and provided its official statement confirming the actual date of acceptance."). If that is the case, the evidence is not sufficient for the reasons set forth above and any conclusion based on that evidence is not reliable. (It is not even clear from the record if the evidence provided by applicants was presented to Ms. Thomas or to someone else.) Even if that is not the case, the letter simply fails to set forth the factual basis on which the conclusion is based. The letter begins "[a]fter further review". However, it is not clear what is meant by "further review". If some type of "further review" in addition to the evidence provided by applicants was conducted, it is not clear what this review comprised. Additionally, it is not clear whether this further review was conducted by Ms. Thomas or by someone else. Contrary to applicants' assertions, the USPTO is not bound by a letter from the USPS which fails to set forth the factual basis on which the conclusion was based.

The totality of the evidence has been considered but is not sufficient to establish that Express Mail mailing label number EV667329735US was deposited with the USPS on 11 April

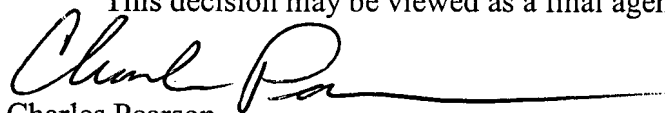
2005.

CONCLUSION

For the reasons set forth above, applicant's renewed petition under 37 CFR 1.10(d) requesting that the papers filed in the submission for entry into the national stage be accorded a receipt date of 11 April 2005 rather than 12 April 2005 is **DENIED**.

Applicant may wish to consider filing a petition to the Commissioner under 37 CFR 1.137(b) requesting that the application be revived.

This decision may be viewed as a final agency decision. See MPEP § 1002.02.

A handwritten signature in black ink, appearing to read "Charles Pearson", followed by a long horizontal line.

Charles Pearson

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